United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1421

To be argued by
ALLEN R. BENTLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1421

UNITED STATES OF AMERICA,
Appellee,

—v.—

LOUIS KENNETH WATSON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ALLEN R. BENTLEY,
AUDREY STRAUSS,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Louis Kenneth Watson appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on September 16, 1976 after a five-day trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

Indictment 75 Cr. 1267, filed on December 31, 1975, charged Watson in Count One with the robbery of the First National City Bank, 334 Fifth Avenue, New York, New York, on June 5, 1975, by force, violence and intimidation, in violation of Title 18, United States Code, Section 2113(a). Count Two charged him with assault and jeopardizing the lives of persons by use of a dangerous weapon during that robbery, in violation of Title 18, United States Code, Section 2113(d).

Trial commenced on July 19, 1976 and ended on July 23, 1976 when the jury found Watson guilty on both counts. On September 16, 1976, Judge Ward sentenced Watson to ten years' imprisonment on Count One, to run concurrently (if authorized by law) with a sentence of fifteen months' to five years' incarceration imposed on Watson for a probation violation in the Commonwealth of Pennsylvania on February 27, 1976. The Court imposed a sentence of one day's probation on Count Two consecutive to the sentence imposed on Count One. Following imposition of the federal sentence, Watson was returned to the custody of the Commonwealth of Pennsylvania, where he is now serving the balance of his state sentence.

Statement of Facts

A. Synopsis

The evidence at trial showed that on June 5, 1975, four armed men robbed a branch of the First National City Bank located at 334 Fifth Avenue, New York, New York. One of the men vaulted the tellers' counter and took $12,244 and a number of blank money orders from the tellers' drawers. (GX 62).* A second man forced a number of bank customers and employees into a washroom at the rear of the bank, where he collected their wallets and ordered them into a stall toilet. A third man pulled the drapes of the bank's front windows and watched the door. The fourth man, whom the jury found to be Watson, stood in the middle of the bank floor coordinating the robbery.

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* Subsequent references to the trial transcript, Government exhibits, Court exhibits, and appellant's brief will be abbreviated as "Tr.", "GX," "CX," and "Br." respectively.

B. Government's Case

Roger Frank testified that on June 5, 1975, shortly after 9:00 a.m., he was in a branch of the First National City Bank located at 33rd Street and Fifth Avenue. Frank had just cashed his pay check and was stepping away from the teller when he saw an armed man jump the tellers' counter. Frank turned to leave but a second man, behind him, ordered him not to move; he tried to put his hands above his head but was told to keep them at his side. (Tr. 146). Frank and others, under threats of being shot, were directed to a bathroom at the rear of the bank. (Tr. 169). Frank was one of the first to enter the stall toilet as directed; the man assigned to herd the group to the bathroom demanded wallets of those who arrived after Frank. (Tr. 169). When everyone was crammed into the toilet, the robber issued orders not to move, said he would be back, and left. Two minutes later, a bank employee opened the bathroom door. (Tr. 169-70). Frank was not asked if he could identify either defendant as having participated in the robbery.*

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* Willie London, whom the Government contended was the man who had herded the group to the washroom, was indicted separately (Indictment No. 76 Cr. 152) but tried jointly with Watson. London was acquitted by the jury on July 22, 1976. This statement of facts omits portions of the proof which pertained solely to London.

The man who vaulted the tellers' counter, Raymond Lawrence Johnson, Jr., was indicted on August 29, 1975 (Indictment No. 75 Cr. 879), on charges of participating in six armed bank robberies. On September 22, 1975, Johnson entered a plea of guilty to four counts of violating 18 U.S.C. § 2113(a), including one count based upon the robbery herein; on October 31, 1975, he was sentenced by Judge Wyatt to incarceration for a period of up to ten years pursuant to 18 U.S.C. § 5010(c).

The fourth man who committed the robbery has not been identified.

Stephen Turek testified that he had entered the bank at shortly after 9:00 a.m. on June 5, 1975 to make a deposit in his checking account. (Tr. 173). Having forgotten to bring a preprinted deposit ticket, Turek approached the service desk to obtain a blank deposit ticket. (Tr. 173). As he waited to speak to Carol Lewis, a bank officer, Turek overheard a man tell Lewis that he wished to open a savings account. After the man stated that he sold vegetables to local merchants, Lewis suggested that he try one of the savings banks, and the man walked away. (Tr. 174). Turek then obtained a deposit slip from Lewis, which he filled out. Turek had taken out his wallet and was about to approach the teller's window when he saw that the man who had preceded him in speaking to Lewis had reentered the bank. That man pointed a gun at Turek and told him not to move. (Tr. 174). Turek noticed that a second man had gone behind the tellers' counter and pulled out a revolver: moments later Turek was escorted to the rear bathroom by still a third man, who was also armed. (Tr. 175).

Turek identified a man wearing a plaid suit one of the bank surveillance photographs as the individual whom he had heard asking Lewis about opening a savings account. (Tr. 193; GX 18). He also identified Watson as similar to the man in question. (Tr. 194). Although Turek's initial description of the robber, furnished to the Federal Bureau of Investigation (hereinafter "FBI"), erroneously described him as having spacing between his teeth (Tr. 199), other facets of the description Turek had furnished—*e.g.*, the height, weight, hair, completion, pock-marked skin and age of the robber—closely matched the physical characteristics of Watson. (Tr. 204-06).

Janice Mickens, a bank teller, testified that on the morning of the robbery she had looked around and noticed that an armed man had come behind the teller's

counter. (Tr. 258). The man ordered Mickens to lie on the floor; he then proceeded to collect the cash from the drawers of three tellers. (Tr. 258). Mickens recalled having seen one of the men walking aimlessly in the bank the day before the robbery and having seen that same man, with several others, standing by a clothing store in the vicinity of the bank on the morning of the robbery. (Tr. 260). She was unable, however, to identify either defendant as a participant in the robbery. (Tr. 261).

Joseph T. Lynaugh, an official assistant employed at the branch in question, testified that he was talking to Lewis at about 9:10 a.m. on June 5, 1975 when a man whom he had noticed walking in the bank approached and said he wanted to open a savings account. (Tr. 341). As Lynaugh was getting out the necessary documents, the man pulled a gun, ordered him to put his hands on the counter, and then directed him to the back of the bank. (Tr. 342). Lynaugh identified Watson as that man. (Tr. 344). Lynaugh further testified that he had successfully identified Watson in a line-up of twelve men at offices of the FBI two weeks before trial. (Tr. 344-45, 401; GX 63).

Special Agent Daniel C. Kingston of the Philadelphia office of the FBI testified that he and Special Agent Paul B. Lorenzetti had interviewed Watson on November 13, 1975, beginning at shortly after 7 p.m. (Tr. 273, 305).*

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* At a pre-trial suppression hearing, held in response to Watson's motion to suppress the statements taken by the agents, the Government established that Watson was incarcerated at the Montgomery County Prison (located in Norristown, Pennsylvania) at the time of the interview. This fact was not elicited during Kingston's direct testimony at trial; however, counsel for Watson elicited it on cross-examination (Tr. 284), then used it in his closing argument to contend that Watson's admissions were unreliable because Watson had acceded, under pressure, to suggestions from Kingston and Lorenzetti. (Tr. 493-94).

Th agents identified themselves by displaying their creder ls and determined that the man they were speaking to, who had been introduced to them as "Kenneth Glover," was in fact Louis Kenneth Watson. (Tr. 274). Watson was advised of his constitutional rights as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Watson said he understood his rights and wanted to talk to the agents. (Tr. 275). They began obtaining background information from him—his name, address, date of birth—but when they asked him for the names and addresses of relatives Watson said he would like to "rap for awhile" rather t answering further questions. (Tr. 276). The agents complied with Watson's request and spoke with him in a general conversation. Later in the course of his meeting with the ts, Watson admitted having participated in the rob involved in this case. His role, he said, was to use a load .45 caliber automatic pistol to hold the customers and tellers at bay. Watson was shown four surveillance photographs taken during the robbery (GX 97-100), each of which depicted a single robber, and identified the man wearing a plaid suit in one of the photographs as himself. (Tr. 277-78, 309; GX 97). Before the agents left that evening, Watson shared a piece of pie with them. (Tr. 279).

On the following day, November 14, 1975, at 1:11 p.m. (Tr. 280), Kingston and Lorenzetti returned to the Montgomery County Prison at Watson's request. (Tr. 279). After again being advised by the agents of his constitutional rights, Watson said that he had recently been in Atlanta, Georgia and his name had been forged on a check. (Tr. 280). He told the agents that he wanted to execute handwriting exemplars to protect himself against the possibility of a forgery charge. Kingston then dic-

tated exemplars to Watson. (Tr. 281). Kingston also testified that on either November 13th or 14th, Watson had said that, in addition to cash, a number of First National City Bank Travellers checks had been taken in the robbery. (Tr. 282).

Special Agent Paul B. Lorenzetti provided further testimony concerning Watson's admissions. (Tr. 356-98). On cross-examination, Lorenzetti acknowledged that Watson, at the time of the interview, had been concerned about a number of other charges or possible charges, stemming from other robberies and a probation violation, which he was then facing. (Tr. 373). Nevertheless Watson was "cool and calm" and the "rapport" of his meeting with the agents was "rather unique." (Tr. 373). On redirect, Lorenzetti was asked what Watson had said his occupation was in response to the background questions with which the interview had begun. (Tr. 395). Lorenzetti testified that Watson had claimed to be an unemployed fruit salesman. (Tr. 395-96).

It was stipulated that on June 5, 1975 the First National City Bank was a bank the deposits of which were insured by the Federal Deposit Insurance Corporation (Tr. 340; GX 61), and that the loss to the bank from the robbery was $12,244 in cash and a number of blank money orders. (Tr. 340; GX 62).

C. Defendant's Case

The defendant did not take the stand.

Watson called Derek Adams, an inmate at the Metropolitan Correctional Center. (Tr. 416-17). Adams, who offered no substantive testimony, was called for the purpose of demonstrating his resemblance to Watson, ostensibly adding weight to the defense of mistaken identity.

ARGUMENT

POINT I

Watson's Rights Under The Speedy Trial Rules Were Not Violated.

On July 19, 1976, Watson moved to dismiss the indictment on the ground that the Government had failed to comply with the provisions of the Amended Plan for Achieving Prompt Disposition of Criminal Cases promulgated by the United States District Court for the Southern District of New York ("the Plan").* Specifically, Watson contended that the Government failed to be ready for trial within the six month period prescribed by Rule 5 of the Plan and that, accordingly, dismissal of the indictment was mandated. The Government took the position that when excludable periods were considered, the six month rule had been met. After extensive hearings on the motion, Judge Ward found that the Government announced its readiness within the six month period and the motion to dismiss was therefore denied.

A. The Proceedings and Evidence Pertinent to the Speedy Trial Motion

On July 19, 1976, Watson moved for dismissal of the indictment claiming a violation of his rights under the Plan. Before selecting a jury, Judge Ward heard argument from counsel, took testimony from one witness

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* The Amended Plan became effective on September 29, 1975 and was in effect during the period at issue in this case. On July 1, 1976, when certain provisions of the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, went into effect, Watson became entitled to a trial within six months of July 1, 1976. 18 U.S.C. § 3161(c) as extended by § 3161(g). His trial commenced only nineteen days after the beginning of that period.

(Agent Lorenzetti) and reserved decision on the motion pending the outcome of the trial. (Tr. 5-11, 20-47, 44-64). On September 7, 1976, Judge Ward received additional documentary evidence and heard testimony from Edward S. G. Dennis, Jr., the Assistant United States Attorney in the Eastern District of Pennsylvania who had handled the Watson case in that District. On September 16, 1976, Judge Ward heard testimony from Michael Daniels, the attorney who had been assigned to represent Watson by a United States Magistrate in the Eastern District of Pennsylvania, and further testimony from Lorenzetti. The substantial record thus made before Judge Ward in connection with Watson's motion established that Watson, following his arrest in Pennsylvania in November 1975, had been the subject of five different proceedings instituted by four different prosecuting offices, and that in light of these active State proceedings, the Federal Government had not violated the Plan in failing to bring Watson to New York before June 1976.

1. The apprehension of Louis Kenneth Watson

On August 1, 1975, Raymond Lawrence Johnson, Jr. was arrested by Kingston, Lorenzetti and other FBI agents at the 30th Street Station Terminal of the Penn Central Railroad, in Philadelphia, Pennsylvania, on a warrant issued by a United States Magistrate in the Southern District of New York, charging him with having participated in the robbery involved in this case. Johnson made statements which led to the identification of Watson as a participant in the June 5, 1975 robbery of the First National City Bank. On August 4, 1975, a complaint was filed in the United States Magistrates Court in the Southern District of New York charging Watson with the First National City Bank robbery, and a warrant was issued for his arrest. The Government

did not know Watson's whereabouts when the warrant was issued; in due course, the National Crime Information Center was notified of the existence of the warrant.

On November 12, 1975, at about 3:35 p.m., Watson was arrested in Pennsylvania by State Trooper Richard P. Hood. Trooper Hood had received a radio report that warrants had been issued for the arrest of two men driving a red 1973 Cadillac bearing Georgia plates, RX 4-637, on a charge of stealing tools from a Cadillac dealership in Reading, Pennsylvania. Hood saw the car, followed it, and confirmed that its occupants fit the description of the men for whom the warrants had been issued. Hood then arrested the two men. Upon his arrest, the driver of the car gave the name "Kenneth Glover." An inquiry with the National Crime Information Center showed that "Glover" was an alias for Louis Kenneth Watson, who was wanted in the Southern District of New York.

2. Post-arrest proceedings

Watson was arraigned on November 12, 1975, before Bernard J. Maher, a Justice of the Peace in Montgomery County, Pennsylvania, on charges of criminal conspiracy and receiving stolen property. Bail was set at $5,000 cash; Watson, unable to make bail, was remanded to the Montgomery County Prison. William Heuser of the Montgomery County Public Defenders' Office was assigned to represent Watson at a preliminary hearing, which was scheduled for November 24th. (CX 8).

On November 13, 1975, having been notified of Watson's arrest, FBI Agents Lorenzetti and Kingston interviewed Watson at the Montgomery County Prison. At that time Watson admitted his role in the robbery with which he had been charged in the Southern District of New York.

On November 14, 1975, Watson was taken to the Berks County Court of Common Pleas, Criminal Division, pursuant to a writ of habeas corpus *ad prosequendum*, for a 3:00 p.m. hearing on charges of theft by unlawful taking or disposition. (CX 3B).* He was returned the same day. (CX 3A). On November 21, 1975, Watson made a second appearance in Berks County pursuant to a writ of habeas corpus *ad prosequendum* requiring his presence for a 3:30 p.m. hearing. (CX 3C). He was returned the same day. (CX 3A).

On November 24, 1976, a preliminary hearing was held before the Justice of the Peace Maher in Montgomery County. A prima facie case was established on the charge for which Watson had initially been arrested. Watson was ordered held for grand jury action in the Montgomery County Court of Common Pleas. (CX 8).

On November 25, 1975, Watson was brought to the United States District Court for the Eastern District of Pennsylvania pursuant to a federal writ of habeas corpus *ad prosequendum* issued on the basis of the complaint which had been filed in the Southern District of New York. (CX 1F). Bail was set at $75,000 with surety and a preliminary hearing was scheduled for December 4, 1975. (CX 1D). Watson was returned to the Montgomery County Prison. Thereafter, Michael Daniels, an attorney with offices in Norristown, where the prison is located, was assigned to represent Watson. (Tr. 664-65; CX 3A, 1C).

On November 26, 1975, Daniels contacted Lorenzetti to discuss a disposition of the various charges Watson faced. (Tr. 48). Lorenzetti referred Daniels to Assistant

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* Earlier on that day, Lorenzetti and Kingston had met with Watson at the prison, at his request, and obtained handwriting exemplars.

United States Attorney Edward S. G. Dennis, Jr., the Assistant in the Eastern District of Pennsylvania in charge of the removal proceedings, and to Assistant United States Attorney Richard G. Hoskins of the Southern District of New York, who was in charge of the prosecution of the underlying offense. (Tr. 48).

On December 4, 1975, Watson was again produced in the Eastern District of Pennsylvania pursuant to a writ of habeas corpus *ad prosequendum*. (CX IA). Watson waived a preliminary hearing and asked to be permitted to remain in Philadelphia, instead of being sent to New York, because negotiations were underway which might lead to the entry of a guilty plea in the Eastern District of Pennsylvania pursuant to the provisions of Rule 20, F.R. Crim. P. (Tr. 704).* The Magistrate presiding asked the Assistant to hold Watson in Philadelphia, if possible,

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* Rule 20 provides in pertinent part:

(b) Indictment or Information Not Pending. A defendant arrested, held, or present in a district other than the district in which a complaint is pending against him may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which he was arrested, held, or present subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys and upon filing of an information or the return of an indictment, the clerk of the court for the district in which the warrant was issued shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant was arrested, held, or present, and the prosecution shall continue in that district. When the defendant is brought before the court to plead to an information filed in the district where the warrant was issued, he may at that time waive indictment as provided in Rule 7, and the prosecution may continue based upon the information originally filed.

pursuant to Watson's request. Although Watson was returned to the Montgomery County Prison on December 4, 1975,* Assistant United States Attorney Dennis made such a request by letter to Chief Deputy Marshal Nicholas L. Vinci dated December 4, 1975. (CX 1H). Dennis testified that a week or more later negotiations for a disposition by guilty plea pursuant to Rule 20 broke down. (Tr. 693). On December 19, 1975, Dennis wrote a second letter to Deputy Marshal Vinci, withdrawing his request. (CX 1G).

The Assistant United States Attorney then assigned to this case in the Southern District of New York, Richard G. Hoskins, not having been told that Watson had been returned to local custody, believed that Watson was in Federal custody and would be transported to New York by the United States Marshal.** This understanding was communicated to his successor, Assistant United States Attorney Allen R. Bentley, who was assigned the case in mid-January, 1976. When Watson was not produced in the Southern District of New York, Bentley contacted one Donald Manno, a Federal prosecutor assigned to the Organized Crime Strike Force in the Eastern District of Pennsylvania and learned, on February 4, 1976, that Watson was in local custody. The Philadelphia prosecutor did not know where Watson was held.

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* Watson's return to local custody was mandated by the terms of the writ pursuant to which he had been produced, which required his presence on December 4th for a "hearing" and that "immediately upon the termination of said proceedings" he be returned to the Montgomery County Prison. (CX 1A).

** The indictment in this case, filed on December 31, 1975, was not immediately calendared for pleading in Part I of the District Court, apparently because it was believed that since Watson's arrival was imminent, pleading could be arranged upon Watson's arrival in the Southern District of New York.

Immediately upon learning that Watson was in local custody, the Assistant began making efforts to locate him. As suggested by Manno, he called the Limerick Barracks of the Pennsylvania State Police, where Trooper Hood was stationed, and was informed by a clerk that Watson had been *released* on $5,000 bail. In fact, Watson had been in local custody during this entire period, but had been transferred to different facilities as he answered charges in various courts.

From December 4th to January 8th, Watson was incarcerated at the Montgomery County Prison. On January 8th, he was taken to the Court of Common Pleas, Philadelphia County, where on April 5, 1974 he had jumped bail on an indictment for burglary. (CX 9). On February 13, 1976, Watson was arraigned on Indictment No. 5377 in the Montgomery County Court of Common Pleas, which charged him with receiving stolen property and conspiracy. (CX 8). On February 17, 1976, Watson was removed from the Montgomery County Prison for legal action in Philadelphia County; he was returned the same day. (GX 3A, 3E). On February 27, 1976, Watson was sentenced by the Court of Common Pleas of Montgomery County to a period of 15 months' to five years' incarceration for violation of probation in connection with his previous conviction on a 1968 indictment. On March 1, 1976, he was transferred to the State Correctional Institution at Graterford, Pennsylvania, to begin serving his sentence. (GX 4). On March 15, 1976, Watson was removed from Graterford at the request of the Philadelphia County District Attorney; he was returned the same day. (GX 4). Watson was removed from Graterford by the Montgomery County District Attorney on March 22, 23, 24, 25 and 26, 1976; he was returned to Graterford each night. (CX 4).

The Assistant's subsequent calls to the Montgomery County District Attorney's Office and the Graterford Cor-

rectional Institution eventually revealed that Watson was incarcerated at Graterford. The process of determining Watson's whereabouts was delayed by his frequent movements, including the permanent transfer from the Montgomery County Prison to Graterford, and by the fact that he was listed by the records room at Graterford under the name "Kenneth Glover."

On March 26, 1976, a writ of habeas corpus *ad prosequendum* was issued in the Southern District of New York at the request of the Office of the United States Attorney, directed to the Warden of Graterford, requiring that Watson be produced on April 5, 1976 for pleading to Indictment 75 Cr. 1267. When the writ was issued, the case was on the calendar in Part I for April 5th; however, the matter was later advanced to March 29th at the direction of the Court.

On March 29th, Watson was not produced in the Southern District: a not guilty plea was entered on his behalf and the case was assigned to Judge Ward. The April 5th writ was left standing in the belief that Watson would be brought to the Southern District on April 5th and that trial could be scheduled promptly thereafter. Watson was not produced on April 5th, however, because he had been removed from Graterford pursuant to a writ of habeas corpus *ad prosequendum* on March 29th by the District Attorney, Philadelphia County, in connection with the burglary indictment. Watson's case in Philadelphia was marked ready and was held as a "backup" trial to a jury case then in progress. Watson was not returned to Graterford until April 14th.

On April 21, 22, 23 and 26, Watson was removed from Graterford to Montgomery County in connection with the charges on which he had initially been arrested.

Between April 5th and May 28th, action to bring Watson to the Southern District was held in abeyance

pending resolution of the various proceedings against him in Pennsylvania. Authorities at Graterford had indicated that Watson was wanted by more than one prosecutor's office.* The Assistant believed that in view of the pending proceedings, a reasonable postponement of the issuance of a new writ was needed to avoid disruption of active state prosecutions and to assure Watson's availability.

On May 28, 1976, the District Court scheduled a pretrial conference for June 16, 1976. A new writ was prepared and Watson was produced on that day. The Government orally announced its readiness (Tr. of June 16, 1976, p. 2), and Watson requested and was granted a 10-day continuance within which to explore the possibility of retaining a private attorney. At a pretrial conference on June 22, 1976, Watson notified the Court that he had been unable to retain private counsel. On June 24, 1976, the Court appointed an attorney to represent him. (Tr. 730). On June 28, 1976, the Government filed its written notice of readiness.

B. The Opinion of the District Court and the Pertinent Law

In an opinion delivered from the bench on September 16, 1976, the District Court held that the Plan had not been violated. This conclusion was grounded on a finding that the six month period within which the Government was required to announce readiness for trial under the

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* This information was correct: during the period from March 29 to April 14, 1976, custody of Watson was sought not only by the Office of the United States Attorney for the Southern District of New York and the Office of the District Attorney, Philadelphia County, but by the Office of the District Attorney, Montgomery County, which had issued a writ of habeas corpus *ad prosequendum* returnable April 6, 1976.

Plan had commenced on December 12, 1975, when negotiations between Dennis and Daniels for a Rule 20 disposition in the Eastern District of Pennsylvania ended. Rule 3(b)(1).* The Court further found that Rule 6(a) of the Plan required exclusion of the period March 29 through April 14, 1976, on the ground that a state proceeding was in progress during that period.** Finally, the Court determined that the Government had announced readiness for trial on June 16, 1976.

Watson claims that the District Court erred in three respects—in its selection of December 12th as the starting date for computations; in excluding the period from March 29th to April 14th, when Watson was in Philadelphia awaiting trial; and in finding that the Government had announced readiness on June 16th.

1. The exclusion until the termination of Rule 20 negotiations

Initially, we note that Judge Ward's finding that Rule 20 negotiations were underway from November 25 to

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* Rule 3(b)(1) provides as follows:

> Where a defendant is apprehended outside this district and held in custody and his case is initially processed under Rule 20 of the Federal Rules of Criminal Procedure, the times set out above shall begin to run where the defendant rejects disposition under Rule 20.

** Rule 6(a) provides as follows:

> In computing the time within which the government should be ready for trial under Rule 5, the following periods should be excluded:
>
> (a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

December 12, 1975 is amply supported by the record. The Philadelphia Magistrate's docket sheet contains an entry for December 4, 1975 stating that "[t]his case may proceed by Rule 20 hearing in this District." (CX 1D). Dennis' December 4th letter to Deputy Marshal Vinci, a phonetic spelling of whose name appears among the notes which Daniels made on December 4th (CX 10), asked that Watson not be transferred to New York "pending negotiations of Federal Rules of Criminal Procedure Rule 20 Transfer of this case from the Southern District of New York. . . ." (CX 1H). Daniels admitted that he had not unequivocally rejected a Rule 20 disposition on December 4th—in fact, his "door was open"—(Tr. 685, 689), conceded that on December 4th he asked Lorenzetti to check the status of certain armed robberies of the American Express Company to which Watson had confessed and had asked Lorenzetti for the name of the Assistant United States Attorney in the Southern District of New York, whom he was going to call about a Rule 20 plea. (Tr. 687, 688). He also stated that he may have told Watson he would contact Montgomery County authorities to determine if Watson could serve his probation violation sentence in Federal custody. (Tr. 688). Contrary to Watson's claim at the hearing held by the District Court and on this appeal that he and his attorney did not consent to any continuance (Tr. 695; Br. 8, fn.), Lorenzetti testified that on December 4th Daniels asked that Watson be held in Philadelphia because plea negotiations were underway. (Tr. 704).

In view of this record, Watson contends that Judge Ward erred as a matter of law in excluding the period from November 25th to December 12th because (1) Watson was not "in custody" and thus Rule 3(b)(1) of the Plan did not apply, and (2) Rule 6 of the Plan, which did govern Watson's case, makes no specific mention of Rule 20 negotiations. This overly mechanistic reading of the Plan must be rejected.

Watson's argument overlooks the fact that Rule 3 of the Plan, notwithstanding its caption ("Time Requirements for Trial of Defendants in Custody and of High Risk Defendants"), does not pertain exclusively to defendants in custody. Subsection (b) of Rule 3 contains comprehensive regulations, the only ones to be found in the Plan, governing time computation intended to control in all cases in which a defendant is arrested outside of the Southern District of New York. Subsection 3(b)(1) provides that for a defendant in custody whose case is initially processed under Rule 20 the time shall run "where the defendant rejects disposition under Rule 20." Subsection 3(b)(2) provides that for those detained defendants who do not initially seek a Rule 20 disposition, the time shall run from the beginning of continuous custody (if the arrest was pursuant to a warrant issued on an indictment or information) or from the date of issuance of a warrant of removal (if the arrest was not pursuant to such a warrant).* Subsection 3(b)(3) provides that in the case of a defendant released on bail, the time does not begin to run until the defendant returns to the Southern District.**

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* Subsection 3(b)(2), provides as follows:

(2) Where a defendant is apprehended outside this district and is held in custody (except for cases initially processed under Rule 20), the times set out above shall begin to run:

(i) Upon the beginning of the defendant's continuous custody, if the arrest was pursuant to a warrant issued on an indictment or information filed in this district;

(ii) Upon the finding and recommendation or order by a magistrate that a warrant of removal shall issue, if the defendant's arrest was not pursuant to such a warrant.

** Subsection 3(b)(3) provides as follows:

(3) Where a defendant is apprehended outside this district and is released pursuant to the provisions of Chapter 207, Title 18, U.S.C., the times set out above shall begin to run when the defendant returns to this district.

The facts of Watson's case are unusual—since Watson was held in local custody outside of the Southern District and was then brought to another District, where Rule 20 discussions were initially had, he was neither "in custody" within the meaning of Rules 3(a)(1) and 3(b)(1) nor "released" within the meaning of Rule 3(b)(3). The clear import of Rule 3(b), however, is that time consumed by proceedings in another District shall not be charged against the Government unless the defendant is in custody on the Federal charge in the other District *and* an indictment has been filed against him in the Southern District of New York. In this case, Watson was not in custody on the Federal charge, nor had he been indicted, when he was produced in the Magistrate's Court for the Eastern District of Pennsylvania. He and his attorney initiated Rule 20 discussions, and further proceedings to remove him to New York were delayed until at least December 12th at his request. Cf. *United States* v. *Oliver*, 523 F.2d 253, 258-59 (2d Cir. 1975). Judge Ward's holding that the six month period did not begin to run until December 12th fully effectuated the purposes of Rule 3 of the Plan. A contrary ruling would have the unfortunate consequence of discouraging efforts to use the beneficial procedure created by Rule 20 by forcing the Government to bring the defendant to the Southern District of New York notwithstanding his bona fide interest in pleading guilty in another District. Whether exclusion of the period of Rule 20 negotiations was proper under Rule 3 of the Plan or under Rule 6(a), which requires the exclusion of the delay resulting from the pendency of "proceedings concerning the defendant," Judge Ward's holding that the six month period began to run on December 12, 1975 was clearly correct.

2. The exclusion for pendency of State proceedings

Judge Ward was similarly correct in holding that the period from March 29th to April 14th was excluded under the Plan. Judge Ward found that:

> "A writ of habeas corpus *ad prosequendum* had been issued in this district on March 26, 1976. That writ was lodged at the Graterford Correctional Institution in Pennsylvania where the defendant had begun serving a state term. At or about the time it was lodged at Graterford, and specifically on March 29, 1976, the defendant was removed to Philadelphia to face other state charges. He appeared in court in connection with those charges on March 29, at which time his attorney failed to appear. On March 30, his attorney did appear and requested a jury trial. The case was sent to a backup part and was held awaiting trial in Philadelphia. The defendant remained in Philadelphia until April 14, at which time he was returned to Graterford.
>
> "The Court has concluded that the period from March 29 to April 14 must be excluded under Rule 6(a), since the Court has concluded that the defendant was awaiting trial of other charges during that period."

Watson's argument that Rule 6(a) does not apply to the "fortuitous circumstance" that he was on trial in Philadelphia when the Government first issued a writ for his presence is incomprehensible. Had Watson *not* been on trial, or awaiting an imminent trial, during that period he would have been brought to the Southern Dis-

trict of New York in early April and the Government would have filed its notice of readiness at that time. The delay in bringing Watson to the Southern District of New York was occasioned by proceedings associated with the Philadelphia burglary charge. This is precisely the kind of problem that Rule 6(a) of the Plan was designed to meet. *United States* v. *Cangiano*, 491 F.2d 906 (2d Cir. 1974).

The District Court correctly held that the "due diligence" standard did not require the Government to issue a writ of habeas corpus *ad prosequendum* superseding that by which the District Attorney of Philadelphia County had obtained Watson's presence, and disrupting the trial calendar of the Philadelphia County Court of Common Pleas, during the period from March 29 to April 14.* Bringing Watson to New York would have forced a postponement of all proceedings in two State cases—since, as a sentenced inmate since March 1, 1976, Watson was protected by Article IV(e) of the Interstate Agreement on Detainers, discussed *infra*, he could not have been returned to Pennsylvania until tried on this federal charge. Moreover, one of the two state cases was substantially older than the federal bank robbery charge. Watson had initially been apprehended by the Pennsylvania State Police. In sum, the teaching of *United States* v. *Oliver*,

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* Although Judge Ward did not find it necessary to pass on the contention, we submit that Rule 6(a) mandates exclusion of the entire period until the last of the State cases was resolved in late April 1976. Likewise, the entire period of the State proceedings is excludable under Rule 6(f) which excludes: "the period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial." *United States* v. *Oliver*, 523 F.2d 253 (2d Cir. 1975).

523 F.2d 253, 258-59 (2d Cir. 1975), in which no violation of the speedy trial rules was found despite the fact that a federal writ had been dismissed by an Assistant United States Attorney at the request of local authorities, is particularly apt herein:

> While a writ of habeas corpus *ad prosequendum* may use mandatory language, the jurisdiction to which such a writ is addressed is relied upon to cooperate in turning over the defendant to the other sovereign. In this situation, principles of comity come into play and the Rules . . . recognize that an Assistant United States Attorney should make 'reasonable efforts' to obtain the defendant's presence for trial, and need not bring to bear all possible federal power." (Footnote omitted.)

3. The Governments announcement of its readiness for trial

Finally, Watson's claim that Judge Ward erred in finding that the Government had announced its readiness on June 16th is untenable. The record reflects that when Watson appeared before the court for a pre-trial conference on June 16th, the Government announced its readiness in open court. (Tr. of June 16, 1976, p. 2). Nothing in the Plan requires a written announcement of readiness. *United States* v. *Rodriguez*, 529 F.2d 598, 601 (2d Cir. 1976); *United States* v. *Masullo*, 489 F.2d 217, 224 (2d Cir. 1973); *United States* v. *Pierro*, 478 F.2d 386, 389 (2d Cir. 1973). The Government's filing of a written notice of readiness on June 28th did not affect the validity of its earlier oral announcement.*

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* Even if one disregards the June 16th announcemnt, no violation of the Plan results. Exclusion of the 16-day period during which Watson remained in Philadelphia and a period of at least

[Footnote continued on following page]

six days after June 16th, when Watson was without counsel for reasons other than the failure of the court to assign counsel, Rule 6(g), brings June 28th well within six months of December 12th, the date on which the time computation is properly commenced.

Since Judge Ward found that the Government had proved excludable time sufficient to bring its announcement of readiness within the six-month rule, he made no findings with respect to a number of the exclusions urged by the Government in opposition to Watson's motion. In the event that this Court finds that Judge Ward erred in any material respect, we respectfully submit that the Government's notice of readiness was timely for reasons other than those on which the District Court relied.

From December 1975 until February, 1976 Watson was "unavailable", Rule 6(d). In addition, for the same period, the delay resulted "from detention of the defendant in another jurisdiction. . . ." Rule 6(f). The prosecuting attorney during that period, no doubt in view of the facts that a Rule 20 disposition had been predicted by the Assistant United States Attorney in the Eastern District of Pennsylvania and Watson had been afforded assigned counsel and two separate hearings in that District, reasonably believed that Watson was in Federal custody and would in due course be transported to New York by the United States Marshals Service. Such reliance on normal procedures, while founded on an erroneous view of the underlying facts, "hardly establishes that the government acted unreasonably or without diligence," *United States* v. *Estremera*, 531 F.2d 1103, 1107 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3660 (May 19, 1976) (nine-month period during which Government placed mistaken reliance on Canadian deportation proceedings, rather than initiating extradition proceedings, was excluded). *Cf. United States* v. *Salzman*, Dkt. No. 76-1357, slip op. 29 (2d Cir., Sept. 28, 1976).

From February 4, 1976, when upon investigation of the reason for Watson's not having been produced in this District the Assistant first learned that he was not in Federal custody, until March 24, 1976, when he learned that Watson was incarcerated at Graterford, Watson was "absent", Rule 6(d). No showing of due diligence is required for the "absence" exclusion. This period is also excludable under the other provision of Rule 6(d) providing for exclusions where the defendant is "unavailable." The exclusion requires a showing of due diligence which, we submit, was met here. During this period the Assistant made

[Footnote continued on following page]

POINT II

The District Court Correctly Held That as a Pre-Trial Detainee Watson Was Not Protected by the Interstate Agreement on Detainers.

The second ground advanced by Watson in support of his motion to dismiss the indictment was that his rights under the Interstate Agreement on Detainers Act, Pub. L. 91-538, 18 U.S.C., App. ("the Agreement"), were violated when he was returned to state custody following the proceedings in the Magistrates Court in the Eastern District of Pennsylvania on November 25, 1975 and December 4, 1975. Judge Ward's rejection of this contention was clearly correct.

The Agreement creates a simplified mechanism whereby a prosecutor can obtain custody of a defendant who is serving a term of imprisonment in another state. It also creates a procedure whereby a sentenced inmate can trigger the prosecution of all charges in a particular jurisdiction giving rise to detainers; trial on such charges must occur within 180 days of the prisoner's request.

This Court recently considered the purpose and effect of the Agreement as it applies to federal prosecutions. *United States* v. *Mauro*, Dkt. No. 76-1251, slip op. 265 (2d Cir., Oct. 26, 1976). In *Mauro*, this Court found that a federal writ of habeas corpus *ad prosequendum*, issued

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numerous telephone calls to prosecutors and jails in Pennsylvania in efforts to locate Watson. Although he was told by a clerk with the Pennsylvania State Police that Watson had made bail, and although the Graterford institution initially denied having custody of Watson, the Assistant persisted and eventually learned that Watson was at Graterford under the name of "Kenneth Glover." Surely Watson should not be the beneficiary of delays attributable, at least in part, to his use of an alias.

pursuant to 28 U.S.C. § 2241(c)(5), was the functional equivalent of a request for custody of a prisoner made under the Agreement. The Court observed that such a writ imported all the adverse consequences for the prisoner that a detainer would entail. Particularly, a prisoner's "ability or even desire to participate in state treatment or rehabilitative programs," the Court noted, is "obviously affected by the uncertainties of the federal trial and possible sentence to be meted out". *Id.* slip op. at 273. The *Mauro* court reasoned, in view of the superfluousness that would otherwise result, that by subscribing to the Agreement Congress implicitly limited the otherwise unfettered scope of the writ *ad prosequendum* authorized by 28 U.S.C. § 2241. *Id.*, slip op. 272 n. 7. Accordingly, *Mauro* held that the restrictions in the Agreement governing the party states apply to the Federal Government when it obtains custody of a state prisoner pursuant to the *ad prosequendum* writ.*

Watson, unlike Mauro, was not serving a term of imprisonment when Federal writs of habeas corpus *ad prosequendum* were issued requiring his presence in the Eastern District of Pennsylvania on November 25, 1975 and December 4, 1975; his status as a pre-trial detainee is uncontested. Examination of the Agreement and consideration of the policies which underpin it confirm that this distinction is determinative in the case at bar.

The Agreement applies "[w]henever a person has entered upon *a term of imprisonment* in a penal or correctional institutional of a party State." Article III(a) (emphasis added). The prisoner's request for trial shall be established and accompanied by:

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* Thus, in this case the Agreement concededly applied when Watson was brought to the Southern District of New York in Mid-June 1976. The Agreement was complied with in that Watson was not returned to Pennsylvania without being tried and was brought to trial well within 120 days of his arrival.

> a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

Article III(a) further provides that

> Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall . . . be deemed to be . . . a waiver of extradiction to the receiving State to serve any sentence there imposed upon him, *after completion of his term of imprisonment in the sending State.* (Emphasis added.)

The language of Article IV(a), authorizing the "receiving state" to obtain "a prisoner against whom [the prosecutor] has lodged a detainer *and who is serving a term of imprisonment* in any party State" (emphasis added), fully dispells the notion that the Agreement applies to all persons incarcerated for whatever reason in a sending state. A detainer may be lodged against a pre-trial detainee as well as a sentenced inmate; the words "and who is serving a term of imprisonment" thus significantly qualify the scope of the Agreement.

Finally, Article V(f) of the Agreement provides that a prisoner transferred under its provisions continues to serve his sentence and may, if authorized by the law of the sending state, earn "good time" while absent from the sending state. This constitutes further evidence that sentenced inmates were to be the beneficiaries of its enactment.

The Agreement is thus a comprehensive and carefully drafted plan for ameliorating the problem of detainers based on untried criminal charges. The drafters of the Agreement considered such eventualities as multiple untried charges in the receiving state, Article III(d); the vagaries of interstate extradiction law and the propriety of requiring a waiver of extradiction by the prisoner invoking the Agreement, Article III(a); the possibility of escape, Article III(f); the computation of time while the prisoner is in the receiving state, Article V(f); and payment of the costs of maintaining the prisoner in the receiving state, Article V(h). Had its architects intended the Agreement to apply to pre-trial detainees, the compact would certainly have so stated.

Watson argues that notwithstanding the clear language of the statute, policy considerations weighed in *Mauro* compel extension of the Agreement of pre-trial detainees. (Br. 11). The contention is meritless. The purpose of the Agreement was to eliminate "charges outstanding . . . [and] detainers based on untried indictments, informations or complaints [because such charges] produce uncertainties which obstruct programs of prisoner treatment and rehabilitation." *United States* v. *Mauro*, *supra*, slip op. at 273.* Unlike sentenced inmates, pre-trial detainees do not participate in the treatment and rehabilitative programs with which untried charges were found to interfere.

Watson's argument, moveover, ignores a countervailing interest which would be effectively subverted were the Agreement construed as he suggests—the public's interest in the orderly and speedy disposition of criminal charges

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* Article I of the Agreement specifically provides that one of the purpose of the law is to avoid "uncertainties which obstruct programs of prisoner treatment and rehabilitation."

in the "sending state." To find in the Agreement unwritten protection for the pre-trial detainee would be to create a potential for untold havoc in those situations where a pre-trial detainee faces criminal charges in a number of different states. While a sentenced defendant need not serve his sentence in the state of conviction and thus the "sending state" under the Agreement has a relatively slight interest in his presence (see Agreement, Article V(f)), a state having custody of a pre-trial detainee has a vital interest in insuring his continued presence in its jurisdiction for trial. It cannot be said that in subscribing to the Agreement, the states and Congress deliberately but without explicitly so stating, exposed their own criminal justice systems to disruptions occasioned by the prosecutive needs of other jurisdictions.*

POINT III

The District Court Properly Exercised Its Discretion in Denying the Jury's Request for a Re-Reading of a Portion of the Summation of Watson's Attorney.

Early in jury deliberations, a note was sent out which read as follows: "Like to hear what Mr. Watson's lawyer had to say about the picture exhibit GX 97, and FBI testimony by Mr. Lorenzetti on Mr. Watson's exhibit GX 97." (Tr. 554). The pertinent testimony was reread. (Tr. 559). The court stated that in the exercise

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* Significantly, the state courts which have considered this issue have consistently held that a pre-trial detainee may not avail himself of the provisions of the Agreement. *Davidson* v. *State*, 18 Md. App. 61, 305 A.2d 474, 479 (Spec. App. 1973); *Seymour* v. *State*, 21 Ariz. App. 12, 515 P. 2d 39 (Ct. App. 1973).

of its discretion, it would not permit a reading of the summation over the objection of the Government, unless defense counsel could cite authority to the effect that such action was required. (Tr. 555). The only authority Watson's attorney could provide was an unnamed case in the Eastern District of New York in which Judge Mishler had, with the consent of the Government and the defense, granted the jury's request for a rereading of portions of both summations, authority which the court did not find persuasive. (Tr. 561). Judge Ward reconsidered his ruling after the jury had heard the requested testimony and retired; however, he adhered to his decision, noting that on the one occasion when he had granted a request for defense counsel's summation a guilty verdict followed not long afterward. (Tr. 561).

It is well settled that a District Judge is vested with broad discretion "to run a trial under reasonable ground rules," *United States* v. *Pollak*, 474 F.2d 828, 832 (2d Cir. 1973), *remanded on other grounds*, 364 F. Supp. 1047 (S.D.N.Y. 1973), *aff'd without opinion*, 492 F.2d 1237 (2d Cir. 1974); *cf. United States* v. *Marquez*, 449 F.2d 89, 93 (2d Cir. 1971); *United States* v. *Conti*, 361 F.2d 153, 158 (2d Cir. 1966), *vacated on other grounds*, 390 U.S. 204 (1968). The trial judge is not bound to comply with requests by the jury for a review of portions of the evidence; he may deny the request entirely, *United States* v. *De Palma*, 414 F.2d 394 (9th Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970); *United States* v. *Carminati*, 247 F.2d 640 (2d Cir.), *cert. denied*, 355 U.S. 883 (1957); or submit additional evidence for the jury's consideration, *United States* v. *Gentile*, 525 F.2d 252, 261 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3545 (March 29, 1976).

No citation is required for the proposition that opening and closing statements by counsel are merely argument, not evidence. Submission of statements made by an advocate in the heat of his summation, as requested

by the jury, not only raised the prospect of unduly emphasizing one portion of the evidence, see ABA Project on Minimum Standards for Criminal Justice, Trial by Jury § 5.2(b) (1968); it threatened to inject conclusory statements into the jury's deliberations and to confuse the jury on the critical distinction between evidence and argument. Where the jury has requested specific testimony, it has been held that to provide instead even an objective judicial summary of the requested material is error because of "the possibility that the jury may be given an erroneous view of the testimony". *United States* v. *Rabb*, 453 F.2d 1012, 1015 (3d Cir. 1971). *A fortiori*, denial of a request for a summary of the evidence presented by a partisan did not constitute reversible error.

Watson has cited no authority for his claim that the trial court erred in refusing to read back a portion of his summation. Indeed, in the only decided case in which this issue has arisen, this Court noted without disapproval the District Court's ruling that summation remarks, although requested, would not be read to the jury because they were not evidence. *United States* v. *Guanti*, 421 F.2d 792, 801 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970). Accordingly, Judge Ward did not abuse his discretion in denying the jury's request for a portion of Watson's lawyer's closing argument.*

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* In Point III of his brief, Watson challenges the sentence of one day's probation imposed on Count Two to run consecutively to the sentence of 10 years incarceration on Count One, citing *Prince* v. *United States*, 352 U.S. 322 (1957); *United States* v. *Pravato*, 505 F.2d 703 (2d Cir. 1974) and *Gorman* v. *United States*, 456 F.2d 1258 (2d Cir. 1972). Under this authority, as well as *United States* v. *Arthur Stewart*, 523 F.2d 1263 (2d Cir. 1975), and *United States* v. *Aaron Stewart*, 513 F.2d 957 (2d Cir. 1975), it is clear that vacatur of the sentence on Count Two is required. Since in this case, as in *Gorman*, the District Judge's "intentions were crystal clear," remand would, we submit, "be needlessly time consuming and a meaningless act." 456 F.2d at 1260. Accordingly, this Court should vacate the sentence on Count Two.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ALLEN R. BENTLEY,
AUDREY STRAUSS,
Assistant United States Attorneys, Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALLEN R. BENTLEY, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 13TH day of DECEMBER, 1976, he served ~~a copy~~ two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

HOWARD L. JACOBS

401 BROADWAY

NEW YORK, NEW YORK 10013

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Allen R. Bentley

Sworn to before me this

13TH day of DECEMBER, 1976

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977